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Supreme Court of the United States

OCTOBER TERM, 1949

No. 35

35

UNITED STATES OF AMERICA,

Petitioner,

v.

AETNA CASUALTY AND SURETY COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT

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on the Brief.

INDEX

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATUTES INVOLVED	3
STATEMENT	3
SUMMARY OF ARGUMENT	3
ARGUMENT	5
CONCLUSION	40
APPENDIX	41

CITATIONS

Cases:

Aetna Life Ins. Co. v. *Moses*, 287 U. S. 530	19
Anderson v. *Hayes Construction Co.*, 243 N. Y. 140, 147	37
Bailey v. *United States*, 109 U. S. 432, 438	12
Baldwin v. *Powell*, 294 N. Y. 130, 132	27
Butler v. *Goreley*, 146 U. S. 303, 311, 312	12, 13
Commissioners of State Ins. Fund v. *E. T. Clark Carting Co.*, 274 App. Div. 559	6, 14
Commissioners of State Ins. Fund v. *Farrand*, 295 N. Y. 493	23
Commissioners of State Ins. Fund v. *United States*, 72 F. Supp. 549	22
Commissioner of State Ins. Fund v. *United States*, 76 F. Supp. 850, 853	22

PAGE

Eisenberg v. *Louis Adler Realty Co.*, 273 App. Div. 641, affirmed 299 N. Y. 572 ..... 6, 14

Employers' Fire Ins. Co. v. *United States*, 167 F. 2d 655, 656, 657 ..... 15, 25, 26, 37, 38

Erwin v. *United States*, 97 U. S. 392, 397 ..... 12, 13

Federal Housing Administration v. *Burr*, 309 U. S. 242, 245 37

Goodman v. *Niblack*, 102 U. S. 556, 559, 560 ..... 12, 13, 17

Hobbs v. *McLean*, 117 U. S. 567, 575 12

Keifer & Keifer v. *Reconstruction Finance Corp.*, 306 U. S. 381, 390, 391, 396, 397 37

Lappin v. *National Container Corp.*, 179 Misc. 109, 37 N. Y. S. 2d 800 22

Liberty Mutual Ins. Co. v. *American Incinerator Co.*, 51 F. 2d 739 22

Magnolia Petroleum Co. v. *Hunt*, 320 U. S. 430 22

Matter of Meng, 227 N. Y. 264, 277 27

Montgomery Ward & Co. v. *Callahan*, 127 F. 2d 32 27

National American Fire Ins. Co. v. *United States*, 171 F. 2d 206 15

Niagara Fire Ins. Co. v. *United States*, 76 F. Supp. 850 ..... 15, 25, 38

North Chicago Rolling Mill Co. v. *Ore & Steel Co.*, 152 U. S. 596, 615-622 32

Old Colony Ins. Co. v. *United States*, 168 F. 2d 931 ..... 15, 21

Posadas v. *National City Bank*, 296 U. S. 497, 503 25

Price v. *Forrest*, 173 U. S. 410, 421, 423 12

Schley v. *Pullman Company*, 120 U. S. 575, 578 ..... 21, 32

PAGE

Skakandy v. *State of New York*, 274 App. Div. 153, affirmed 298 N. Y. 886 ..... 6, 14

State Farm Mutual Liability Ins. Co. v. *United States*, 172 F. 2d 737 15

State of Maryland, to use of Burkhardt v. *United States*, 165 F. 2d 869 27

Taylor v. *New York Central R. Co.*, 294 N. Y. 397, 402, certiorari denied 326 U. S. 786 ..... 6, 14, 22

Travelers Ins. Co. v. *Padula*, 224 N. Y. 397, 405 27

United States v. *American Tobacco Co.*, 166 U. S. 468 10

United States v. *Chicago, Rock Island and Pacific Ry. Co.*, 171 F. 2d 377 15

United States v. *Hill*, 171 F. 2d 404 15

United States v. *Hill*, 174 F. 2d 61 ..... 15, 16

United States v. *Munsey Trust Co.*, 332 U. S. 234 32

United States v. *Shaw*, 309 U. S. 495, 501 36

United States v. *South Carolina State Highway Dept.*, 171 F. 2d 893, 898, 899, 900 ..... 15, 34

United States F. & G. Co. v. *Graham & Norton, Co.*, 254 N. Y. 50 22

Van Wie v. *United States*, 77 F. Supp. 22 11

Western Pacific Co. v. *United States*, 268 U. S. 271, 275 ..... 12, 13

Wojciuk v. *United States*, 74 F. Supp. 914 ..... 15, 25

Yorkshire Ins. Co. v. *United States*, 171 F. 2d 374 15

Statutes:

Federal Tort Claims Act, Act of August 2, 1946, c. 753, Title IV, 60 Stat. 842, 28 U. S. C. 931 et seq.:

Sec. 410(a) 3, 24, 41

Sec. 421 ..... 3, 41

PAGE

New York Workmen's Compensation Law:

Sec. 29 ..... 2, 3, 5, 6, 7, 12, 13, 14, 22, 29, 30, 31, 45

R. S. 3477, 31 U. S. C. 203 ..... 2, 3, 4, 5, 6, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 23, 24, 25, 27, 28, 31, 40, 44

28 U. S. C., as enacted by the Act of June 25, 1948, Public Law 773, 80th Cong., 2d sess.:

Sec. 1346(b) 3, 10, 29, 43
Sec. 1346(c) 3, 43
Sec. 1402(b) 29, 44
Sec. 1404(a) 30, 31, 44
Sec. 2401(b) 7
Sec. 2674 ..... 3, 10, 24, 43
Sec. 2678 ..... 3, 30, 34, 43
Sec. 2680 ..... 26, 41

10 Stat. 612 35
24 Stat. 505 35
36 Stat. 851 35
41 Stat. 525 36
42 Stat. 1066 ..... 21, 36
43 Stat. 112 36

Miscellaneous:

Federal Rules of Civil Procedure:
Rule 17(a) 9, 47
3 *Moore's Federal Practice*, 2d ed., 1948, ¶ 13.02, p. 7 32
3 *Moore's Federal Practice*, 2d ed., 1948, ¶ 17.09, p. 1350 9
19 Comp. Gen. 504 21
21 Comp. Gen. 341 21
22 Comp. Gen. 611 21
36 Op. Atty. Gen. 553 21

IN THE

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UNITED STATES OF AMERICA,

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v.

AETNA CASUALTY AND SURETY COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT

The petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit was granted by order filed April 25, 1949 (R. 27).

Opinions Below

The opinion of the United States District Court for the Eastern District of New York (R. 11-14) is reported at 76 F. Supp. 333. The majority opinion of the United States Court of Appeals for the Second Circuit and the concurring opinion of Judge Learned Hand (R. 17-22) are reported at 170 F. 2d 469.

Jurisdiction

The petitioner invokes the jurisdiction of this Court under 28 U. S. C. 1254(1).

Question Presented

The sole question presented by petitioner is whether the prohibition of R. S. 3477, 31 U. S. C. 203, barring the assignment of claims against the United States, may be invoked by the Government to prevent maintenance of an action against it under the Tort Claims Act instituted by an insurance carrier to which has been transferred by operation of law (Section 29 of the Workmen's Compensation Law of the State of New York) the entire cause of action of a workman injured in New York by the negligence of the Government, where by the operation of said New York statute no cause of action remains in the injured workman and the entire cause of action belongs to and can be maintained only by the insurance carrier.

In the courts below the petitioner contended that the Tort Claims Act must be strictly interpreted and applied so as to permit suit only by direct claimants and to prevent suit by subrogees or assignees by operation of law (R. 5, 6, 7, 12, 13, 19). This contention has now been abandoned by petitioner.

In the petition for certiorari petitioner conceded that the language of the Tort Claims Act places the United States in the shoes of a private person in all respects, making it subject to actions on tort claims by assignees or subrogees whenever such actions are permitted against private persons by state law (Petition, p. 8).

Statutes Involved

Sections 410(a) and 421 of the Federal Tort Claims Act, Act of August 2, 1946, c. 753, Title IV, 60 Stat. 842, now, with immaterial amendments, in the new Judicial Code; 28 U. S. C. 1346(b), 1346(c), 2674, 2678; R. S. 3477, 31 U. S. C. 203; and Section 29 of the New York Workmen's Compensation Law, are set forth in the appendix, *infra*.

Statement

The facts are incompletely stated in the petition for writ of certiorari and in the petitioner's brief. Peter Vambell was injured on February 8, 1945. The Federal Tort Claims Act was passed on August 2, 1946. Section 29 of the New York Workmen's Compensation Law, as amended by L. 1947, c. 9 and c. 144, permitted an injured workman to bring an action not later than nine months after the enactment of the Federal Tort Claims Act. These nine months expired May 2, 1947. On that day Vambell's entire cause of action was transferred to the respondent by the operation of Section 29 of the New York Workmen's Compensation Law. On May 28, 1947, the respondent instituted this action.

It is conceded by petitioner that respondent is properly the assignee by operation of law of Vambell's entire cause of action. (See Petition, pp. 11, 12; Petitioner's brief, pp. 36, 37.)

Summary of Argument

POINT I. The failure of Vambell, the injured person, to commence an action against the United States within the time limited by Section 29 of the New York Workmen's Compensation Law operated to assign his entire cause of action to the respondent. Thereafter, only the respondent,

the insurance carrier, owned the cause of action and could sue thereon. Vambell had no interest in the cause of action as such and he could not sue on it. If the prosecution of the action by the respondent were to be held barred by R. S. 3477, then no one could sue the United States for its tort and the United States would be unjustly enriched. Petitioner's brief is based upon its failure to recognize this clear and simple proposition. Accordingly, none of petitioner's arguments has any validity.

POINT II. The Anti-Assignment Act, R. S. 3477, 31 U. S. C. 203, does not apply to the instant case because the assignment of Vambell's cause of action was by operation of law and involuntary. The purpose of R. S. 3477, to prevent fraud upon the Government and the embroilment of the Government in conflicting claims, has no applicability to the instant case.

POINT III. The test of the right of the respondent to maintain this action is whether the respondent would have a cause of action under the law of New York if the petitioner were a private person.

POINT IV. The petitioner's contention that R. S. 3477 should now be interpreted so as to bar this action on an involuntarily assigned claim, because the petitioner anticipates that it may have certain hypothetical, procedural difficulties in other cases, has no merit. No valid reason has been presented by the petitioner for upsetting the proposition, which has been so well established by a long line of decisions of this Court, that R. S. 3477 does not apply to transfers by operation of law

POINT V. The current trend of legislative policy and of judicial thought is towards the abandonment of the monarchistic doctrine of governmental immunity. The enactment of the Federal Tort Claims Act is a conspicuous step forward in the progress of this trend. The attempt of the

petitioner to invoke the Anti-Assignment Act as a bar in the instant case is in direct conflict with this trend. In addition to all the other reasons, this justifies the Court in refusing to sustain the contention of the petitioner and in permitting the instant action to be maintained by respondent.

ARGUMENT

POINT I

The failure of Vambell, the injured person, to commence an action against the United States within the time limited by Section 29 of the New York Workmen's Compensation Law, operated to assign his entire cause of action to the respondent. Thereafter, only the respondent, the insurance carrier, owned the cause of action and could sue thereon. Vambell had no interest in the cause of action as such and he could not sue on it. If the prosecution of the action by the respondent were to be held barred by R. S. 3477, then no one could sue the United States for its tort and the United States would be unjustly enriched. Petitioner's brief is based upon its failure to recognize this clear and simple proposition. Accordingly, none of petitioner's arguments has any validity.

Section 29 of the New York Workmen's Compensation Law (Appendix, *infra*, pp. 45, 46) specifically provides that if an injured employee, or in case of death, his dependents, has taken compensation, but has failed to commence action against the negligent person within a specified time, such failure shall operate as an assignment of the cause of action against such negligent person to the insurance carrier liable for the payment of compensation.

It is the well and firmly established law of New York that after such assignment the injured person has no inter-

est in the cause of action as such and that no action thereon can be brought by the injured person or in his name.

Taylor v. *New York Central R. Co.*, 294 N. Y. 397, 402, certiorari denied 326 U. S. 786.
Skakandy v. *State of New York*, 274 App. Div. 153, affirmed 298 N. Y. 886.
Commissioners of State Insurance Fund v. *E. T. Clark Carting Co.*, 274 App. Div. 559.
Eisenberg v. *Louis Adler Realty Co.*, 273 App. Div. 641, affirmed 299 N. Y. 572.

The petition for writ of certiorari herein conceded that under Section 29, as amended, of the New York Workmen's Compensation Law, Vambell's cause of action was automatically assigned to respondent upon Vambell's failure to commence an action against the United States within nine months after the passage of the Federal Tort Claims Act (Petition, p. 11).

Accordingly, it is obvious that Vambell can no longer bring an action against the United States and that if respondent's action be held barred by R. S. 3477, no one can sue the United States for its tort and the United States is unjustly enriched.

Nevertheless, petitioner refuses to recognize this clear and simple proposition. Petitioner's brief is based upon the fallacious contention that this action can be brought in Vambell's name. Upon such a false premise, petitioner concludes erroneously that invoking R. S. 3477 to bar respondent's action will not prejudice any substantial rights of respondent.

Petitioner's brief states (p. 13) that the question involved is whether under R. S. 3477 the Government may require an insurance carrier claiming under statutory assignment to sue and recover in the name of the original claimant.

This is designed to make it appear that only a procedural question is involved, whereas in fact, the Government's proposition would effectuate the destruction of a

substantive right vested in the insurance carrier by New York statute, because respondent cannot sue in Vambell's name.

Petitioner's brief also states (p. 13): "The reversal of the lower court decisions in these cases cannot ultimately defeat the insurance carriers' substantive rights. The Act of April 25, 1949, c. 92 (P. L. 55, 81st Cong.), has amended the limitation provision of 28 U. S. C. 2401(b) so that at any time before April 25, 1950, the original claimants may be joined as additional parties or new actions brought in their names."

Obviously, this is not true in the instant case because: by Section 29 of the New York Workmen's Compensation Law Vambell's cause of action has been assigned in toto to respondent; no action can be brought in Vambell's name; he has no interest in the cause of action as such to give him any standing in court as a party plaintiff; and if respondent cannot sue in its own name, no one can sue and respondent is deprived of substantive rights.

Furthermore, while petitioner in this case, No. 35 of this calendar, seeks a dismissal of the complaint against this respondent-insurance carrier, the only one who could bring the action—and while in case No. 36 petitioner asks that that cause be remanded with instructions to the Trial Court to modify the original judgment giving the entire recovery to the original claimant, and while in cases No. 37 and 38 the petitioner asks that the cause be remanded with instructions to consolidate the actions, yet (in a footnote, No. 2, at p. 13, bottom, of petitioner's brief) it is subtly suggested that "the reversal of the lower Court decisions in these cases cannot ultimately defeat the insurance carriers' substantive rights".

Nothing is further from the truth.

The extension of time to April 25, 1950, provided by the Tort Claims Act, to bring suit can only be available to one who under state law can bring the suit. It is only the respondent—subrogee, assignee by operation of law—who owns the cause of action and all rights to maintain it. This

respondent was given these rights by the New York State law upon the expiration of the nine-month period following the passage of the Tort Claims Act within which the injured could have sued.

Since the injured Vambell failed to exercise his right to sue within the nine-month period as aforesaid, his rights were automatically and irrevocably transferred to the respondent who thus became the subrogee-assignee by operation of law. Therefore, a reversal in this case, No. 35, means a dismissal against the only party who can sue herein—an absolute destruction of the substantive rights of the only one who can be a proper plaintiff in the action.

Again, petitioner's brief states (p. 15) that the liabilities of the United States should be discharged and the fiscal interests of the Government should be protected by requiring derivative claimants to bring their suits under the Tort Claims Act in the names of the original claimants.

Since, in the instant case, suit cannot be brought in the name of Vambell, the original claimant, the liability of the United States will not be discharged if the action cannot be brought by and in the name of the respondent.

Petitioner's brief states (p. 15) that respondent would be able to protect its rights by intervening or joining in a suit brought by Vambell, the original claimant, so as to obtain a direction which would require the original claimant upon receipt of payment of the judgment entered in his name, to repay to respondent whatever sum the respondent was subrogated to.

Obviously, that could not be done in the instant situation. No judgment could be rendered in favor of Vambell, the original claimant, because his entire cause of action was assigned by law to respondent and Vambell had no cause of action.

Petitioner's brief states (p. 44) that the instant case does not fall "into the category of cases where the legal status of the original claimant is changed, so that unless the representative or successor is allowed to prosecute the

claim, the United States will be unjustly enriched by escaping liability for the tort of its employee,—".

That is obviously incorrect. The legal status of Vambell has been changed insofar as the cause of action is concerned. It has been taken from him and given to respondent. Therefore, unless the respondent is permitted to sue the United States, the latter will be unjustly enriched.

Petitioner's brief states (p. 60) that if the injured workman should fail to bring an action, the insurance carrier is fully able to protect its derivative right under the state law by bringing an action against the United States in the name of the workman.

That is incorrect. An action brought in the name of the injured workman, after his cause of action has been assigned by Section 29 to the insurance carrier, would have to be dismissed, because the injured workman has no cause of action. It belongs to the insurance carrier. Furthermore, the procedure and practice do not permit any action by the injured workman to the use of the insurance carrier. There is but one cause of action which, by virtue of Section 29, belongs entirely to the respondent insurance carrier and the action must be brought by and in the name of the respondent as the owner of the cause of action and the real party in interest (Rule 17(a), Federal Rules of Civil Procedure; 3 *Moore's Federal Practice*, 2d Ed., 1948, ¶ 17.09, p. 1350).

In the Court below, where the petitioner contended that the respondent was not the real party in interest, the Court said:

> "Plaintiff is the only real party in interest. The New York statute gives it alone the right to sue, even though it may have to account for part of the recovery to the injured employee. To the extent the plaintiff must turn over its recovery to another it is a 'party authorized by statute' to sue in its own name, expressly designated the 'real party in interest' by Rule 17. None of the cases cited by the Government involved plaintiffs so clearly authorized by statute to bring the action" (R. 21, 22).

Upon the incorrect assertion that an action can be maintained in Vambell's name and that respondent will not lose any substantive rights, petitioner requests that R. S. 3477 be interpreted to bar this action. On the other hand, it is clear that to invoke R. S. 3477 as a bar would deprive respondent of substantive rights and unjustly enrich the United States because no action can be brought in Vambell's name and if respondent cannot maintain this action, then no one can sue the Uited States on this tort claim.

Petitioner's brief cites *United States* v. *American Tobacco Co.*, 166 U. S. 468 (affirming 32 Ct. Clms. 207), throughout, for the proposition that suit should be brought in the name of the original claimant in the "traditional" manner followed under the Tucker Act. In that case the Tobacco Co. had the legal title to the claim, the carriers having only an equitable interest. In this case the respondent has the legal title to the entire claim. Under the law of New York only the respondent can sue on this cause of action. No action can be brought in Vambell's name. Therefore, the *American Tobacco Co.* case has no application to this case.

The Tort Claims Act provides that the United States shall be liable in the same manner and to the same extent as a private individual under circumstances where such private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred (28 U. S. C. 2674, 1346(b)). The negligent act here involved occurred in New York. Under the law of that state a private person would be liable to respondent under the circumstances of this case (conceded in Petition, top of p. 12). Accordingly, the petitioner is liable to the respondent in the instant case.

In spite of the protestations of the Government that it does not seek to avoid responsibility, such is the inevitable result of the position it takes in this case. On the one hand, the respondent would not be allowed to sue and, on the other hand, a plaintiff would be substituted who by operation of state law has no cause of action and no right to sue. Thus, in one fell swoop, both the purposes of the

New York State Legislature and of the Congress of the United States would be frustrated.[1]

POINT II

The Anti-Assignment Act, R. S. 3477, 31 U. S. C. 203, does not apply to the instant case because the assignment of Vambell's cause of action was by operation of law and involuntary. The purpose of R. S. 3477, to prevent fraud upon the Government and the embroilment of the Government in conflicting claims, has no applicability to the instant case.

At common law there can be no assignment of a claim or cause of action for personal injuries. Obviously, the anti-assignment statute (R. S. 3477, enacted June 22, 1874, derived from Act July 29, 1846, c. 66, 9 Stat. 41, and Act February 26, 1853, c. 81, sec. 1, 10 Stat. 170) was not enacted to bar claims that could not be assigned in any event. Before the Tort Claims Act of 1946, the Government could not be sued on common law tort claims. The words of R. S. 3477: "All transfers and assignments made of any claim" encompass only claims of a nature which were within the contemplation of Congress and the existence of which were recognized. Accordingly, it is clear that R. S. 3477 was intended to apply only to contract claims against the Government, such as could be presented to some depart-

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[1] Petitioner's attorneys have shifted their positions and changed their arguments whenever they deemed it to their advantage in order to thwart the purposes of the Tort Claims Act and to restrict its application. An illustration is *Van Wie* v. *United States*, 77 F. Supp. 22, where an administratrix sued to recover for the wrongful death of her decedent and for property damage to decedent's motor vehicle. Petitioner contended, unsuccessfully, that the administratrix was not the real party in interest and that, since under Rule 17(a) a party cannot sue to the use of another who is sui juris, the action had to be maintained by two subrogee insurers which had paid compensation benefits and indemnification for the property damage.

ment or officer for payment, or prosecuted in the Court of Claims.

In *Hobbs* v. *McLean*, 117 U. S. 567, 575, this Court said:

> "R. S. 3477, it is clear, only refers to claims against the United States which can be presented by the claimant to some department or officer of the United States for payment or may be prosecuted in the Court of Claims."

It is submitted that R. S. 3477 cannot now be used to bar an assignment of a tort claim without distorting and stretching its purpose and its plain meaning.

It has been established by a long line of decisions of this Court that, even with respect to contract claims, R. S. 3477, 31 U. S. C. 203, applies only to voluntary assignments and not to involuntary transfers by operation of law.

Erwin v. *United States*, 97 U. S. 392, 397.
Goodman v. *Niblack*, 102 U. S. 556, 560.
Bailey v. *United States*, 109 U. S. 432, 438.
Butler v. *Goreley*, 146 U. S. 303, 311, 312.
Price v. *Forrest*, 173 U. S. 410, 421, 423.
Western Pacific Co. v. *United States*, 268 U. S. 271, 275.

Thus by the language of the statute and by the decisions of this Court it is clear that R. S. 3477 applies only to voluntary assignments of contract claims and cannot be applied to an assignment by operation of law of a tort claim.

That the assignment of Vambell's cause of action to the respondent was involuntary is indisputable. The petitioner conceded (Petition, p. 11)[2] that when Vambell failed to

[2] The petition for writ of certiorari reads at page 11:

> "1. Under Section 29, as amended, of the New York Workmen's Compensation Law, Vambell's cause of action was automatically assigned to respondent upon Vambell's failure to commence an action against the United States within nine months after the passage of the Federal Tort Claims Act."

commence an action against the United States within the time limited by Section 29 of the New York Workmen's Compensation Law, that statute operated automatically to assign his cause of action to the respondent.

Nevertheless, petitioner's brief (p. 40) and the petition for writ of certiorari (pp. 13, 14) attempt to cast some doubt on the involuntary nature of the assignment by saying that the contract of insurance was voluntarily entered into, that Vambell chose to accept compensation and to permit the assignment of his claim to respondent by failing to institute action himself, and that, therefore, the transfer was voluntary.

The only insurance contract involved was one between Vambell's employer and respondent. The employer was required by the New York Workmen's Compensation Law to provide compensation insurance for his employees. Furthermore, Vambell's acceptance of compensation and failure to sue the United States within the time limited by Section 29 did not render the transfer voluntary. Petitioner fails to distinguish between the voluntary making of an assignment and the performance or omission of an act which, by reason of its legal consequences, results in a transfer of the claim. In the latter situation it has been decided, time and again, that the transfer was not voluntary and not within the purview of R. S. 3477.

Goodman v. *Niblack*, 102 U. S. 556, voluntary assignment for benefit of creditors.

Erwin v. *United States*, 97 U. S. 392, voluntary petition in bankruptcy.

Butler v. *Goreley*, 146 U. S. 303, deed of assignment in voluntary insolvency.

Western Pacific Co. v. *United States*, 268 U. S. 271, claim acquired through a judicial sale.

As was stated in the opinion below:

"What is more, the assignment in this case is not voluntary; the claim passed to plaintiff, regardless of

> Vambell's intent or even of his knowledge that, by delaying, he lost his rights, * * *" (R. 20).

It is clear, therefore, that the assignment in the instant case was involuntary and by operation of law.

As we have shown, *supra*, according to the New York Workmen's Compensation Law, after such assignment, Vambell no longer had any cause of action and no action could be brought by him or in his name.

> *Taylor* v. *N. Y. Central R. Co.*, 294 N. Y. 397, 402, certiorari denied 326 U. S. 786.
>
> *Skakandy* v. *State of New York*, 274 App. Div. 153, aff'd 298 N. Y. 886.
>
> *Commissioners of the State Insurance Fund* v. *E. T. Clark Carting Co.*, 274 App. Div. 559.
>
> *Eisenberg* v. *Louis Adler Realty Co.*, 273 App. Div. 641, aff'd 299 N. Y. 572.

Thus the assignment to the respondent made the respondent the only one who could bring the action against the United States. If such action were now held to be barred by R. S. 3477, then no one can prosecute the claim against the United States and the United States is unjustly enriched.

The petitioner's brief (pp. 59, 60) seeks to soften the effect of this by saying that there is adequate provision for indemnification of insurance carriers because Section 29 of the New York Workmen's Compensation Law gives the carrier a lien on any recovery had in an action brought by the injured workman. But, if no action be brought by the injured workman, there is nothing to which a lien may attach. It is for this very reason that the New York Legislature provided that, if the injured person did not sue the negligent third party within a certain time, his cause of action should be assigned to the insurance carrier.

Since the assignment was involuntary and by operation of law, the Court of Appeals for the Second Circuit correctly decided that R. S. 3477 does not bar the respondent's action.

That R. S. 3477 does not bar claims under the Federal Tort Claims Act by subrogees or assignees by operation of law has been decided by a number of other Courts of Appeals and by a number of District Courts.

United States v. *South Carolina State Highway Dept.*, 4 Cir., 171 F. 2d 893.
Old Colony Ins. Co. v. *United States*, 6 Cir., 168 F. 2d 931.
Employers' Fire Ins. Co. v. *United States*, 9 Cir., 167 F. 2d 655.
National American Fire Ins. Co. v. *United States*, 9 Cir., 171 F. 2d 206.
Yorkshire Ins. Co. v. *United States*, 3 Cir., 171 F. 2d 374.
United States v. *Chicago, Rock Island & Pacific Ry. Co.*, 10 Cir., 171 F. 2d 377.
State Farm Mut. Liability Ins. Co. v. *United States*, 1 Cir., 172 F. 2d 737;
Niagara Fire Ins. Co. v. *United States*, D. C., S. D. N. Y., 76 F. Supp. 850.
Wojciuk v. *United States*, D. C., E. D. Wis., 74 F. Supp. 914.

The only Court of Appeals decision to the contrary is *United States* v. *Hill*, 5 Cir., 171 F. 2d 404. However, on rehearing, that decision was modified (*United States* v. *Hill*, 174 F. 2d 61).

The original majority opinion, 171 F. 2d 404, conceded that R. S. 3477, 31 U. S. C. 203, applied only to voluntary assignments and did not apply to transfers of title by operation of law. However, the majority concluded that the subrogation resulted from the voluntary acts of the parties and constituted a voluntary assignment. The Court, therefore, set aside the judgments appealed from and remanded the cause with directions to enter judgments against the United States in favor of the original claimants, ignoring the claim of the subrogee, State Farm Insurance Co. Hutcheson, C. J., dissented, holding that the Anti-Assignment Act did not bar the subrogee's claim.

On reargument (*United States* v. *Hill*, 174 F. 2d 61) the Court in bank stated that the original opinion would stand as expressing the views of the majority of the Court respecting the applicability of 31 U. S. C. 203, R. S. 3477. Nevertheless, the last three sentences of the opinion were withdrawn and two paragraphs substituted to the effect that, all the original claims being in court, "there was no error in refusing to dismiss the insurer out of the case here". The Court reformed the judgment to provide that each of the original claimants should recover the full amount of his claim and that the insurer should, in turn, be paid out of the net recovery of each original claimant. As so corrected, the judgment was affirmed. Hutcheson, C. J., who had dissented from the original opinion, concurred in the result, stating that he was still of the opinion that the judgment appealed from in no manner violated the Anti-Assignment Act, but, since the judgment was now affirmed, instead of reversed, he was able to concur in the result as in substantial accordance with the views his dissent expressed.

We believe that the opinion of the majority of the Court of Appeals for the Fifth Circuit, to the effect that the subrogation resulted from the voluntary acts of the parties and constituted a voluntary assignment, is erroneous and resulted from a failure to distinguish between a voluntary assignment and an act or omission, which, by reason of its legal consequences, causes a transfer by operation of law.

Thus six of the seven circuits who have considered the question have determined that R. S. 3477 is no bar to claims by subrogees or assignees by operation of law.

In the instant case the assignment of Vambell's cause of action to the respondent was by operation of law and involuntary. Therefore, respondent's claim is not barred by R. S. 3477.

Despite the well-established principle that R. S. 3477 does not apply to involuntary assignments, the petitioner contends (Brief, p. 24) that R. S. 3477 should be applied, whether the assignment be voluntary or involuntary,

wherever it is necessary to effectuate the purpose of R. S. 3477 to prevent fraud upon the Government and to avoid the Government's becoming embroiled in conflicting claims.

The reasons for the enactment of the Anti-Assignment Act, which in the Act of February 26, 1853, 10 Stat. 170, was entitled "An Act to Prevent Frauds upon the Treasury of the United States", clearly indicate that said Act should not apply to a case like the one at bar. This Court in *Goodman* v. *Niblack*, 102 U. S. 556, 559, 560, stated that the mischiefs designed to be remedied by the statute were:

> "First. The danger that the rights of the Government might be embarrassed by having to deal with several persons instead of one, and by the introduction of a party who was a stranger to the original transaction.
>
> Second. That, by a transfer of such a claim against the Government to one or more persons not originally interested in it, the way might be conveniently opened to such improper influences in prosecuting the claim before the departments, the courts or the Congress as desperate cases when the reward is contingent on success, so often suggest."

In the instant case, the respondent, the only one in interest, the only one owning the cause of action, is the only one who can make the claim as demonstrated above. Vambell, the injured party, had lost all his interest in the cause of action when he failed to bring his action within the time provided therefor by the Workmen's Compensation Law of New York. Under the first test, no claim can be maintained by the party who lost all his rights in the cause of action to the respondent, the insurance carrier. Therefore, the Government will have to deal with only one person, the respondent herein. Thus there is no danger that its rights will in this case be embarrassed by having to deal with several persons.

Under the second test, it cannot be urged by the petitioner that the respondent insurance company was brought into the case as plaintiff, in place of the original claimant,

because of any belief that the respondent would be able to exercise influence in the collection of this claim. Clearly the mischief sought to be prevented under the second test knocks out any thought that this Act was intended to cover a case like this where neither the original claimant nor the assignee by operation of law did anything voluntarily to create the assignment, but rather the transfer of interest in the cause of action was due to the automatic operation of the New York Workmen's Compensation Law. Neither the assignor nor the assignee "brought in" the respondent. The law did.

Now, let us take the language of the Anti-Assignment Act which petitioner asked be read literally. It requires the following:

1. That the assignment shall be "freely made and executed in the presence of at least two attesting witnesses". How is an automatic assignment by operation of the Workmen's Compensation Law, transferring a cause of action of an injured party to the compensation carrier, to be "made and executed in the presence of at least two attesting witnesses"? The very language of this statute indicates it referred to the type of assignment that is reflected in the execution of a document by the assignor and thus capable of being witnessed by two witnesses.

2. Further, it is to be made "after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof". Can it be sincerely urged by petitioner that the automatic operation of the law, which passes a claim to an insurance carrier upon the failure of the injured to take action, is such a claim as can be computed and ascertained as to the amount due at the time of such assignment by operation of law? Is this the kind of a claim for which a warrant for the payment thereof (by the Government, of course) is required as of the instant the law automatically transfers ownership of the claim to the insurance carrier?

It is too obvious to require much comment that at the time of the transfer of interest in the cause of action from the injured party to the compensation insurance carrier it was impossible for the amount due on the cause of action to have been ascertained, for the claim to have been allowed and for any warrant for the payment thereof to have been issued. The type of assignment involved in this case, viewed in the light of the procedure set forth in the Anti-Assignment Act, clearly establishes that such an assignment by operation of law was never within the scope of the Anti-Assignment Act.

Petitioner's brief (pp. 12, 13) says that the Government invokes the bar of R. S. 3477 against suits by insurance carriers in their own names *solely* for two reasons: (1) to insure that the United States may avoid involvement in any litigation as to the existence or extent of subrogation or other assignment of such claims; and (2) to insure that the suits and any judgments against the United States will be in the names of the original claimants so that the United States will be able to avail itself of its statutory rights in respect of venue, and of any counterclaims and off-sets it may have against the original claimants.

Neither reason has any force nor any applicability to the instant case. As to the second alleged reason, we shall show, *infra*, that the Government is not deprived of any rights as to venue, counterclaim, or off-set in the instant case or in any action by an assignee or subrogee. As to the first alleged reason, we believe it is manifest that it has no application to the instant case and furnishes no cause for departing from the principle that R. S. 3477 does not apply to involuntary transfers.

In the instant case, Vambell's entire cause of action was assigned to the respondent by operation of law and the respondent is the only one with whom the Government has to deal (*Aetna Life Ins. Co.* v. *Moses*, 287 U. S. 530). Therefore, there is no danger of fraud, no danger of multiplying the number of persons with whom the Government has to deal, no danger of the Government becoming embroiled

in conflicting claims, and no danger of involvement in litigation as to the existence or extent of assignment of the claim.

The petitioner also contends (pp. 40, 41) that R. S. 3477 has been held inapplicable only where there is but one person with whom the Government has to deal, such as a trustee or executor; that in those cases the Government can deal with the successor in the same manner as it would have dealt with the original claimant, without the harassment of conflicting claims; and that in those cases it is necessary to withdraw the transfer from the operation of R. S. 3477 "to prevent unjust enrichment to the United States by way of windfall". That is the exact situation in the instant case. The respondent is the only one with whom the Government has to deal and can deal. The Government can deal with the respondent just as it would have dealt with Vambell had he instituted a timely action. And if R. S. 3477 be held to bar this case, the United States will be unjustly enriched by windfall.

We do not believe it necessary to devote much space arguing against petitioner's contention that R. S. 3477 should be invoked in order to avoid the necessity of the Government maintaining an effective filing and index system. That was a matter for Congress to consider and the intent of Congress in enacting the Tort Claims Act and granting important substantive rights to *all* claimants should not be thwarted because of this alleged administrative difficulty.

The complaint of the petitioner that new and difficult administrative problems will be created for the Attorney General and the Comptroller General should subrogees and assignees by operation of law be permitted to sue, should be viewed in the light of the fact that under other and prior statutes they have admitted, allowed and paid claims of subrogees and assignees by operation of law, including insurance carriers as subrogees, and the Attorney General and the Comptroller General have both approved of such

conduct. (See 36 Op. Atty. Gen. 553, referring to the "Small Torts Claims Act", 42 Stat. 1066, 31 U. S. C. 215; 19 Comp. Gen., p. 504, approving subrogees' claims against W. P. A. under the Emergency Relief Act, 53 Stat. 936; 21 Comp. Gen. 341; 22 Comp. Gen. 611.)

Furthermore, in this case there is no difficulty in guarding against duplication. In this case the insurance carrier has to state the name of the injured party to whose rights it has succeeded. The petitioner need only make a record of the name of Vambell, the injured, in connection with this case. One more card containing Vambell's name cross-indexed to the name of the Aetna, the respondent, subrogee-assignee by operation of law, is all that is required to prevent duplication. Besides, if Vambell brought any suit, he could not recover since the time within which he could have sued, as provided by New York law, had elapsed. Thus, by looking up the New York law, which created the substantive rights, and checking the relevant dates, petitioner would be able to dismiss any action brought by Vambell.

The difficulty anticipated by the petitioner is largely imaginary. There is only one example of confusion cited in petitioner's brief (*Old Colony Ins. Co.* v. *United States*, 168 F. 2d 931). The facts concerning this matter are not in the record.[3] However, we have been informed that the Government's version is incorrect, that the insurance company's counsel not only advised the Government of the receipt of the check, but offered to return it if the Government wanted to apply for a writ of certiorari; but the Government stated it would not apply for certiorari and consented that the check be retained and used so that the case could be dismissed when it was remanded to the District Court.

All of this, of course, has no application to the instant case where the United States has only the respondent to deal with, Vambell having lost his cause of action by the

[3] It is improper and a breach of professional propriety to assert as facts matters not in the record. Such matters cannot be taken into consideration. *Schley* v. *Pullman Company*, 120 U. S. 575, 578

operation of Section 29 when he failed to bring a timely action.

The petitioner makes an abortive attempt to indicate that even in cases such as the instant case there is a possibility of conflicting claims and cites *Liberty Mutual Ins. Co.* v. *American Incinerator Co.*, 51 F. 2d 739, and *United States F. & G. Co.* v. *Graham and Norton Co.*, 254 N. Y. 50, for the proposition that the carrier is not assigned the right to prosecute the complete claim in every case. Those cases do not refer to personal injury actions, like the instant case, where there is no doubt the entire claim is assigned (*Taylor* v. *N. Y. Central R. Co.*, 294 N. Y. 397, 402). They refer only to such death actions where the dependents who accepted compensation do not comprise all the next of kin for whose benefit the death action exists. Those cases held that in such a situation Section 29 did not apply, the cause of action for wrongful death was not assigned and the action had to be brought by the administrator (cf. *Lappin* v. *National Container Corp.*, 179 Misc. 109, 37 N. Y. S. 2d 800).

The petitioner also suggests that Section 29 might not operate on the entire claim in a hypothetical situation where an injured employee might have rights of compensation under the law of New York, where he was employed, and the law of another state, where the injury occurred. Ordinarily, in the absence of special circumstances, the final award by one state will bar an additional award by another state (*Magnolia Petroleum Co.* v. *Hunt*, 320 U. S. 430). But even if two awards be made and the law of the other state differ from Section 29, there will be no conflict, because the employee's application for and acceptance of compensation from New York will cause Section 29 to operate to transfer the entire cause of action to the insurance carrier.

Likewise, *Commissioners of State Insurance Fund* v. *United States*, S. D. N. Y., 72 F. Supp. 549, 76 F. Supp. 850, 853, merely establishes the respondent's contention that the Government is not confronted by conflicting claims. It was held in that case that where the time limit within

which the injured employee might institute action has not passed, he owns the cause of action and is the only one who may sue, but when the time limit has passed, his cause of action has been transferred to the insurance carrier, which is the one who may sue.

Petitioner also cites, incorrectly, *Commissioners of State Insurance Fund* v. *Farrand*, 295 N. Y. 493, as deciding that the mere institution of suit by the original claimant is not enough to bar assignment to the insurance carrier. The actual holding in that case is that the institution of suit by the injured workman against one tort feasor does not bar the assignment of the cause of action against another tort feasor.

The true situation in the instant case, and in cases like it, is that up to a certain date the injured workman has a cause of action against the United States; but if he fails to institute such action by that date, then automatically the complete cause of action is transferred to the insurance carrier, which is the only one who can thereafter prosecute the action. Such action must be prosecuted in the name of the insurance carrier or not at all.

We respectfully submit that R. S. 3477 does not apply to the instant case because the assignment was by operation of law and involuntary. Furthermore, the purpose of R. S. 3477 to prevent fraud on the Government and to avoid its being embroiled in conflicting claims has no applicability to the instant case.

POINT III

The test of the right of the respondent to maintain this action is whether the respondent would have a cause of action under the law of New York if the petitioner were a private person.

The Tort Claims Act states:

> "* * * the United States shall be liable in respect of such claims to the same claimants, in the same

manner and to the same extent as a private individual under like circumstances, • • •" (Tort Claims Act, Sec. 410(a); 28 U. S. C. 2674).

Since it is undisputed that if the negligent act herein had been committed by a private person, respondent would have, under the law of New York, a cause of action against such person, it follows that under the words of the Tort Claims Act, the respondent has a right to maintain this action against the petitioner.

There is no question but that respondent's claim comes within the language of the Tort Claims Act. The complaint alleges that Vambell was injured by the negligence of employees of the United States, by reason of which he was damaged in the sum of $20,000 (R. 2, 3); and that by his failure to commence timely action against the United States (R. 3) and his taking of compensation, his claim and cause of action was assigned to respondent (R. 4). As stated in the opinion of the Court below: "Plaintiff's claim is founded on, limited by, and substituted for, Vambell's claim for personal injury" (R. 20). The claim sued upon is for money damages for personal injuries caused by the negligence of employees of the United States under circumstances where the United States, if a private person, would be liable to respondent, the claimant.

As an additional reason for holding that R. S. 3477 did not bar the respondent's claim in the instant case, the Court below stated: "• • • we think the language and purpose of the Tort Claims Act more than sufficient to carve out an implied exception for this type of claim" (R. 20). While the grounds which had already been assigned by the court below for sustaining respondent's right to maintain this action were amply sufficient, nevertheless, we believe this last statement of the Court is justified by the broad language of the act, the plain meaning of its words, the intent of Congress, the historical background of the act and the reasons which led to its enactment.

Employers' Fire Ins. Co. v. *United States*, 167 F. 2d 655.

Niagara Fire Ins. Co. v. *United States*, 76 F. Supp. 850.

Wojciuk v. *United States*, 74 F. Supp. 914.

In contending that the Court below erred in making the above statement, the petitioner says that the language and purpose of the Tort Claims Act are fully served if the person originally damaged can maintain the action. The petitioner also contends that the Tort Claims Act did not repeal R. S. 3477 in terms or by necessary implication and that such an implied exception to R. S. 3477 constitutes a repeal by implication which should not be invoked because the purpose of the Tort Claims Act will be fully served by permitting suit only by the person originally sustaining the loss or injury. Petitioner's contentions cannot be substantiated.

We have shown that Vambell, the person originally damaged, cannot maintain the action. Therefore, according to the petitioner's own contention, the purpose of the Tort Claims Act is not served if R. S. 3477 were to be held to bar the instant action.

The broad language and the purpose of the Tort Claims Act warrant the conclusion that Congress intended that claims by subrogees and assignees by operation of law should be permitted and should not be barred by R. S. 3477. Unless the repugnancy between two statutes is plain and unavoidable, they should be so construed as to give effect to both.

Posadas v. *National City Bank*, 296 U. S. 497, 503.

The intent of Congress and of the Tort Claims Act and of the Anti-Assignment Act will be given effect by construing the Anti-Assignment Act as it has been for many years—as not applying to assignments by operation of law.

Congress must have known about the Anti-Assignment Act and must have believed that it would not apply to

tort claims and to claims by subrogees or assignees by operation of law.

The effect of the Government's contention that the respondent, an assignee by operation of law, is barred creates an additional exception to the twelve exceptions already set forth in the Tort Claims Act (28 U. S. C. 2680). If Congress intended to make such an exception it would have said so.

In *Employers' Fire Ins. Co.* v. *United States*, 167 F. 2d 655, 656, 657, the opinion says:

> "In the Federal Tort Claims Act, Congress, though granting jurisdiction generally to the Federal Courts to render judgment on 'any claim', designated twelve categories of claims to which the Federal Tort Claims Act was not meant to apply. Claims of subrogees were not included therein. Had Congress intended to exclude subrogated claims, it would have undoubtedly designated them as one of the categories which the Act was not meant to cover. * * *
>
> * * * * * * *
>
> "The Government has premised its position largely on the principle that statutes in derogation of sovereign immunity must be strictly construed. Where a statute contains a clear and sweeping waiver of immunity from suit on all claims with certain well defined exceptions resort to that rule cannot be had in order to enlarge the exceptions."

Petitioner's brief (p. 48) states that it seems hardly likely that Congress intended that the persons who might sue the United States on the claim of another should depend on the particular variations of local State law. However, that is the very intent of Congress, as shown in the express language of the Tort Claims Act which says that the United States shall be liable to *any* claimant in the same manner and to the same extent as a private person under circumstances where such private person would be liable to the claimant in accordance with the law of the state where the act or omission occurred.

The petitioner's brief also contends (pp. 52, 53) that the State law governs only whether an actionable wrong was committed, but that *who may sue* is governed by the law of the federal forum, and the law of the federal forum is R. S. 3477. That contention is likewise incorrect. The cited case of *State of Maryland, to use of Burkhardt* v. *United States,* 165 F. 2d 869, merely holds that the provisions of the Tort Claims Act itself govern the time within which the death action shall be brought. The cited case of *Montgomery Ward & Co.* v. *Callahan,* 127 F. 2d 32, merely holds that the procedural question of whether the action on behalf of an incompetent might be brought by a next friend or guardian ad litem, or had to be brought by a legally appointed guardian, was determined by the law of the forum, viz., Rule 17(c) of the Federal Rules of Civil Procedure.

However, the question involved in the instant case is not procedural but a question of substantive law, i.e., who owns the cause of action and who may enforce it. A cause of action inherently includes the right to maintain an action thereon. *Travelers Ins. Co.* v. *Padula,* 224 N. Y. 397, 405. A right of action belongs to the person who has a right to prosecute it and the right of a specified person to maintain an action is as integral to the right of action as the liability of the defendant. *Matter of Meng,* 227 N. Y. 264, 277; *Baldwin* v. *Powell,* 294 N. Y. 130, 132.

Under the law of New York, the respondent could maintain a similar action against a private person. Therefore, pursuant to the very words and intent of the Tort Claims Act, the respondent should be permitted to maintain this action against the United States. A totally different statute, R. S. 3477, by its terms, meaning and purpose inapplicable to the instant case, should not be interpreted and stretched so as to bar this action.

POINT IV

The petitioner's contention that R. S. 3477 should now be interpreted so as to bar this action on an involuntarily assigned claim, because the petitioner anticipates that it may have certain hypothetical, procedural difficulties in other cases, has no merit. No valid reason has been presented by the petitioner for upsetting the proposition, which has been so well established by a long line of decisions of this Court, that R. S. 3477 does not apply to transfers by operation of law.

At the outset, we desire to point out that petitioner's brief discusses many matters which have no connection with the facts of the instant case, nor with the law applicable thereto. Petitioner's brief raises in general many imaginary horribles which it fears might arise in different cases and in different situations, such as where the plaintiffs are partial subrogees and the original claimants still retain ownership of parts of the claim, where the Government might be required to defend several actions in several jurisdictions on different parts of the same claim, or where the Government might have cross-claims, counterclaims or off-sets against the original claimants. None of this, of course, has any application to the instant case. This case should be decided on the facts of this case alone.

The petition for writ of certiorari herein conceded that the language of the Tort Claims Act was sufficient to make the United States subject to actions on tort claims by subrogees or assignees (Petition, p. 8). Nevertheless, the petitioner adopts the contradictory position of contending that the interests of the Government require that R. S. 3477 be so interpreted as to prevent such claims. The reasons advanced for such contention are that, otherwise, (1) the Government would be subject to the possibility of multiple suits; (2) venue would be permitted in a district other than that in which the original claimant could have

sued; (3) the Government's right of counterclaim and off-set would be impaired; and (4) provisions of state workmen's compensation statutes might be in conflict with and override the provisions of federal law.

The petitioner states that the avoidance of these difficulties is of great importance to the United States, whereas it is of no great moment to the insurance carriers that they be permitted to sue in their own names. The respondent disagrees, most emphatically, with that statement. We have shown that unless the respondent herein can maintain this action in its own name, the respondent will be deprived of substantive rights, because action cannot be maintained by Vambell or in his name.

The Government would have the Court believe that procedural difficulties of minor importance outweigh the irreparable destruction of valuable substantive rights.

The difficulties anticipated by the petitioner are entirely hypothetical. Moreover, they are procedural and can be easily avoided by the application of the available procedural remedies, such as consolidation of causes, joinder and addition of parties, change of venue, etc. On the other hand, to deny to the insurance carriers the right to sue as subrogees or assignees by operation of law will, in many instances, deprive them of substantial rights and of any indemnification for the losses which they have paid.

(A) Insofar as the instant case is concerned, the four reasons advanced by the petitioner have neither applicability nor merit.

As we have demonstrated, the first hypothetical difficulty that the Government might be subjected to multiple suits, is not involved in the instant case, since Section 29 of the New York Workmen's Compensation Law has operated to assign the entire cause of action to the respondent.

The second alleged difficulty—as to venue—is really no difficulty at all. 28 U. S. C. 1402(b) provides that a tort claim against the United States under subsection b of Sec-

tion 1346 must be prosecuted only in the district where the plaintiff resides or wherein the act or omission complained of occurred. 28 U. S. C. 1404(a) provides that for the convenience of parties and witnesses, in the interest of justice, a District Court may transfer any civil action to any other district or division where it might have been brought. Therefore, the District Court may change the venue of the case to the district wherein the act or omission complained of occurred—and the Government will not be faced with any difficulty of attempting to defend a case in a district far removed from the place of the occurrence.

The third alleged difficulty of which the Government complains, viz., that a right of counterclaim or off-set might be lost, is purely hypothetical and non-existent in the instant case. The Government has no counterclaim or off-set against Vambell, the injured person, and merely presents an academic proposition in no way related to this case.

The fourth alleged difficulty, that there will be imposed on the prosecution of the claim all the incidents of the New York Workmen's Compensation Law and that said statute is in conflict with the Federal Tort Claims Act with respect to attorneys' fees, is likewise non-existent. There is no conflict.

Section 29 of the New York Workmen's Compensation Law permits the insurer to retain one-third of the amount recovered in excess of the total amount of compensation awarded, plus medical expenses and expenses incurred in effecting such recovery. The Tort Claims Act (28 U. S. C. 2678) restricts attorneys' fees to 20 percent of the recovery. The petitioner contends that, therefore, the two acts are in conflict. There is no conflict at all. First, the amount of recovery might not exceed the total amount of compensation payable by the insurer. Second, the amount of attorneys' fees, if any, charged as an expense of recovery, would have to be within the limit of 20 percent permitted by the Federal Tort Claims Act. Third, if the recovery were to exceed the compensation payable, plus medical expenses,

and expenses incurred in effecting such recovery, the one-third of such fees retained by the insurer would not represent attorneys' fees. That amount represents compensation to the insurer for its efforts in effecting the recovery. Consequently, there is no conflict between Section 29 of the New York Workmen's Compensation Law and the Tort Claims Act. In any event, the terms of the Tort Claims Act, limiting attorneys' fees to 20 percent of the recovery, would prevail, and in any such action the attorneys' fees would be limited accordingly.

It is clear, therefore, that, insofar as the instant case is concerned, the reasons which the Government considers so important as to require R. S. 3477 to be interpreted contrary to the manner in which it has been interpreted for so many years, are of slight or no importance. They have no applicability to the instant case.

(B) Likewise, the petitioner's said reasons have neither merit nor importance in general and present no valid ground for barring generally all claims by subgrogees or assignees by operation of law.

The first difficulty—the problem of multiple claims—can arise only where there has been subrogation of part of a claim. However, any such problem is easily solved by applying the procedural remedies of consolidation or adding parties provided by the Federal Rules of Civil Procedure. The purpose of R. S. 3477 to prevent fraud and to avoid the Government being embroiled in conflicting claims is not frustrated by the fact that several claims may be made on parts of one claim. The claims are not conflicting but are supplementary to each other.

The second alleged difficulty—the problem of venue—is likewise over-emphasized by the Government. Even if a number of suits were brought in different districts by various partial subrogees, the venue provisions of the Judicial Code (28 U. S. C. 1404(a)) will enable the Government to have them all removed to one district—where the wrongful act occurred—and consolidated into one action in that district.

The third alleged difficulty, the loss of a possible right of counterclaim against the original claimant, is likewise over-emphasized by the Government. If the Government has a counterclaim against an original claimant, no substantial right of the Government will be impaired by permitting a subrogee or assignee to sue. The Government will still have its right of set-off, which may be asserted as a counterclaim (3 *Moore's Federal Practice*, 2d ed., 1948, ¶ 13.02, p. 7).

As stated in the opinion of the Court below:

> "Of course, the Government may assert a counterclaim arising out of the same transaction to the extent of plaintiff's recovery. Clark, Code Pleading (2d ed., 1947) 679-682" (R. 21).

The self-serving letter of the Comptroller General, attached to petitioner's brief as Appendix B,[4] presents no reason for distorting and stretching R. S. 3477 so as to make it apply to actions by subrogees. Indeed, it is startling to find the representatives of the largest law office in the country, aided by the representatives of the largest accounting office in the country, suggesting that citizens should be deprived of rights in order to avoid inefficiency and possible "delay and confusion" in government offices.

The remedy of the United States is not limited to 31 U. S. C. 227. In any action under the Tort Claims Act by a subrogee or by an assignee by operation of law the United States may plead and prove as an off-set any claim which the United States has against the original claimant (cf. *North Chicago Rolling Mill Co.* v. *Ore & Steel Co.*, 152 U. S. 596, 615-622; *United States* v. *Munsey Trust Co.*, 332 U. S. 234). In addition, the Government's right of off-set and counterclaim will be enhanced, because the Government, besides having the right of off-set based on what the assignor might owe, will have the further right of off-set or counterclaim against the assignee for what, if anything, the assignee might owe the Government.

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[4] This being dehors the record, it falls within the condemnation of *Schley* v. *Pullman Company*, 120 U. S. 575, 578.

The petition for certiorari states that the Government is not concerned with set-offs or counterclaims arising out of the same transaction, but only with counterclaims arising out of other transactions (Petition, p. 17). If that be so, there is no reason why the Government should not commence a separate action against the original claimant. The Government would still have available to it all the rights that are available to a private litigant.

Since the Government has the right of set-off in any action by a subrogee or assignee, and since the Government can commence a separate action against the original claimant upon any cause of action arising out of another transaction, we believe that the petitioner, in now contending that its right of counterclaim might be defeated if actions by subrogees or assignees are permitted, is putting up a straw man.

As stated in the opinion below:

> "It is argued that, if the government wants to assert an unrelated counterclaim against the employee or seek from him more than the amount recoverable by the plaintiff, allowing this action might force the government to bring a separate suit and pro tanto its right of counterclaim against the original claimant would be lost; that is to say, to give full effect to this favored situation of the government, we must override as to subrogees and involuntary assignees the direction that we must treat the United States as we would a private individual. We think, however, that the reiterated requirement that we should treat the United States like a private individual is the more fundamental, and the Congress did not intend to limit the jurisdiction of the district courts more than it is limited by the specific exceptions" (R. 20, 21).

The fourth alleged difficulty and problem, concerning the matter of possible conflicts of the various workmen's compensation statutes with the Tort Claims Act, is another straw man. We do not know whether any workmen's compensation statute (other than the New York statute) does or does not conflict in any respect with the Tort Claims Act. However, in any action brought under the Tort Claims Act, the provisions of that Act as to attorneys' fees

will prevail. There is no possibility that any provision of any workmen's compensation statute would be permitted to override a provision of the Tort Claims Act. As to attorneys' fees, the 20 percent limitation of the Tort Claims Act will control and no deduction for attorneys' fees in excess of that amount will be permitted, for it would be a violation of 28 U. S. C. 2678.

We believe, therefore, that the reasons given by the petitioner for the barring of subrogated claims have no merit.

In *United States* v. *South Carolina State Highway Dept.*, 171 F. 2d 893, 898, 899, 900, the Court of Appeals for the Fourth Circuit had the following to say about the same arguments advanced by the Government:

> "It is said that to permit suit by subrogees will result in the splitting of causes of action and in denying to the United States the right of set-off and counterclaim provided for by 28 U. S. C. A. § 1346(c); and that, for this reason, Congress could not have intended to authorize suits by or in behalf of subrogees. We see nothing whatever in this argument to justify our ignoring the plain words of the statute. So far as the right of set-off and counterclaim is concerned, the rights of the subrogee to recover cannot rise above those to whose rights he has been subrogated. United States v. Munsey Trust Co., 332 U. S. 234, 239, 240, 67 S. Ct. 1599, 91 L. Ed. 2022. And no great hardship is involved in suing in another case for recovery on a counterclaim which exceeds the claim of the subrogee. So far as the splitting of causes of action is concerned, this is a matter to be handled under the Rules of Civil Procedure relating to the consolidation of actions and the adding and dropping of parties. * * *
>
> "We think that the points raised by the defense have as little real merit as they have technical validity. The government has very properly decided to waive immunity and subject itself to suit for the wrongs committed by its agents and servants, with certain definite exceptions, just as though it were a private person or corporation. Where an insurance company has indemnified the injured person for the loss he has sustained because of the wrong, there is no reason at law or in common sense why it should not be subrogated pro tanto to the rights of the injured party, just as though the suit were against a private person."

POINT V

The current trend of legislative policy and of judicial thought is towards the abandonment of the monarchistic doctrine of governmental immunity. The enactment of the Federal Tort Claims Act is a conspicuous step forward in the progress of this trend. The attempt of the petitioner to invoke the Anti-Assignment Act as a bar in the instant case is in direct conflict with this trend. In addition to all other reasons, this justifies the Court in refusing to sustain the contention of the petitioner and in permitting the instant action to be maintained by respondent.

The doctrine that the Government is immune to claims stems originally from the ancient English aphorism that "The King can do no wrong". Such a doctrine has no place in representative government. Throughout the course of the years, Congress, conscious of the inequities and injustices resulting from the application of such a doctrine and in accord with the requirements of the citizens of our representative government, has seen fit to whittle away this immunity.

A constant succession of Acts has been promulgated by Congress towards this end:

The Court of Claims (for claims not sounding in tort).

February 24, 1855, c. 122, § 1, 10 Stat. 612.

The Tucker Act (giving the District Courts jurisdiction co-extensive with the Court of Claims of all claims not exceeding $10,000 and not sounding in tort).

March 3, 1887, c. 359, 24 Stat. 505.

Suits for Patent Infringement (making the United States liable for unlicensed use of patents).

June 25, 1910, c. 423, 36 Stat. 851.

Suits in Admiralty Act (in which the United States subjected itself to suits for damages caused by government-owned merchant ships). (First departure from immunity against torts.)

March 9, 1920, c. 95, 41 Stat. 525.

Small Claims Act (giving the administrative heads of the Government authority to adjust tort claims below $1,000).

December 28, 1922, c. 17, 42 Stat. 1066.

Public Vessels Act (in which the United States subjected itself to suits for damages caused by government-owned public vessels).

March 3, 1925, c. 428, 43 Stat. 112.

Federal Tort Claims Act.

August 2, 1946, c. 753, Title IV, 60 Stat. 843.

Thus, it is apparent that, notwithstanding any particular reasons given for the enactment of any act on any particular occasion, the ultimate fact is established that each act constituted a surrender by the Government of part of its immunity.

Judicial thought likewise has indicated that the old monarchistic principle that "The King can do no wrong" and all the derivatives therefrom have fallen into disfavor. More and more the expressed and considered opinions of this Supreme Court have reflected great reluctance to continue in the groove of this ancient English precedent.

In *United States* v. *Shaw*, 309 U. S. 495, 501, the opinion states:

"A sense of justice has brought a progressive relaxation by legislative enactments of the rigor of the im-

munity rule. As representative governments attempt to ameliorate inequalities as necessities will permit, prerogatives of the government yield to the needs of the citizen."

In *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U. S. 381, 390, 391, 396, 397, referring to the claim of immunity by a governmental corporate agency, the opinion states:

"Such a firm practice is partly an indication of the present climate of opinion which has brought governmental immunity from suit into disfavor, partly it reveals a definite attitude on the part of Congress which should be given hospitable scope. • • •

Congress has embarked upon a generous policy of consent for suits against the government sounding in tort even where there is no element of contract. • • •

Congress has thus clearly manifested an attitude which serves as a guide to the scope of liability implicit in the general authority it has conferred on governmental corporations to sue and be sued. We should be denying the recent trend of Congressional policy to relieve Regional from liability."

In *Federal Housing Administration* v. *Burr*, 309 U. S. 242, 245, the opinion states:

"As indicated in Keifer & Keifer v. Reconstruction Finance Corp., *supra*, we start from the premise that such waivers by Congress of governmental immunity in case of such federal instrumentalities should be liberally construed. This policy is in line with the current disfavor of the doctrine of governmental immunity from suit, as evidenced by the increasing tendency of Congress to waive the immunity where federal governmental corporations are concerned."

The opinion of the late Judge Cardozo while on the Court of Appeals of the State of New York, before his ascent to this Supreme Court, in *Anderson* v. *Hayes Construction Co.*, 243 N. Y. 140, 147, cited with approval in *Employers' Fire Ins. Co.* v. *United States*, 167 F. 2d 655, 656, states:

"The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We

are not to add to its rigor by refinement of construction where consent has been announced."

Thus the current trend of judicial thought as to the doctrine of governmental immunity is in line with the trend of the legislative policy of abandoning this ancient doctrine.

The Tort Claims Act marked a long step forward in the abandonment and surrender of the doctrine of governmental immunity. Clearly, it intended to put the Government in the position of a private citizen with respect to torts, except as to those twelve particular exceptions specified in the Act. "The words of the Act indicate a clear and sweeping waiver of immunity" (*Employers' Fire Ins. Co.* v. *United States*, 167 F. 2d 655, 656).

The Tort Claims Act, in providing that the Government should be subject to the test of liability as if it were a private person, achieves the objective of parity between the Government and its citizens as to tort claims without any limitation or exception based upon the nature or type of claimant or claim, except as contained in the twelve exceptions mentioned in the Act. This is a drastic and far-reaching departure from the prerogatives of immunity previously asserted by Government. It is in accord with the trend of Congressional policy and judicial thought.

In line with the sweeping waiver of immunity granted by Congress in the Tort Claims Act, it is clear that Congress intended to make this Act available to insurance companies claiming as subrogees and assignees by operation of law as well as to other claimants. (*Niagara Fire Ins. Co.* v. *United States*, 76 F. Supp. 850.) [5]

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[5] On July 24, 1946, just 9 days prior to the enactment of the Federal Tort Claims Act, the Committee on Claims of the House of Representatives had recommended that the subrogee claimants involved in *Niagara Fire Ins. Co.* v. *United States* be paid. Subsequently, no bill was submitted to Congress for the payment of any claims of those subrogees. They were left to their remedy under the Federal Tort Claims Act (*Niagara Fire Ins. Co.* v. *United States*, 76 F. Supp. 850, 852, 853).

In the lower Court the petitioner placed primary emphasis on the argument that the Tort Claims Act should be strictly construed and that, in accord with such narrow construction, the Act should be interpreted so as to exclude claims by subrogees and assignees by operation of law, and permit claims only by the original claimants. In this Court, the petitioner has abandoned that proposition, conceding now that the terms of the Tort Claims Act are broad enough to include claims by insurance companies as subrogees and assignees by operation of law. However, to achieve indirectly the result which it failed to achieve directly in the lower courts, petitioner now urges the Anti-Assignment Act as a bar. It has been demonstrated under Points II and III, supra, that the Anti-Assignment Act was never intended to apply to a case such as the instant case and that the decisions of this Court and the history of said Act indicate that it applied to a different type of case.

Likewise, it has been clearly demonstrated that Congress manifested an intention to permit claims by insurance companies as subrogees and assignees by operation of law under the Tort Claims Act, and, furthermore, that such intent on the part of Congress is in accord with the trend of legislative policy and judicial thought.

The attempt by the petitioner to interpose the Anti-Assignment Act as a bar to the rights of the respondent under the Tort Claims Act constitutes an effort to thwart Congressional intent and policy. It conflicts with the trend of judicial thought. Rejection of the petitioner's ill-founded contention would give effect to the Congressional intent as expressed in the Tort Claims Act, in line with the recent trend of Congressional policy and judicial thought, and help to bring this country nearer to the goal of equality under the law between the Government and its citizens.

CONCLUSION

Since the difficulties evisioned by the petitioner are hypothetical and, if any of them should ever occur in any case, may be overcome by application of the available procedural remedies, R. S. 3477 should not be stretched to apply to a situation it was never intended to cover and to thwart the purpose, intent and plain meaning of the Tort Claims Act. Petitioner's indirect effort to retain part of the immunity of sovereignty waived by the Tort Claims Act should not be permitted to prevail. The monarchistic maxim that "The King can do no wrong", which gave birth to the doctrine of sovereign immunity, is repugnant to the principles of a democracy and has no place in representative government. The people of the United States proceed on the principle that the Government is their servant and not their master. Consonantly therewith, Congress made the Government liable in tort in the same manner and to the same extent as a private individual would be under like circumstances in accordance with the law of the state where the negligent injury occurred. It is indisputable and conceded that had the petitioner been such a private person or individual it would, under the laws of the State of New York, be liable to the respondent. To hold that the respondent herein, who could maintain a similar action in a New York State court had the tort feasor been a private person, may not maintain this action against the United States would frustrate the purpose of the Tort Claims Act and cause irreparable injustice to the respondent.

For all the reasons mentioned herein, it is respectfully submitted that the reversal of the judgment of the District Court by the Court of Appeals was correct and that the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

Statutes Involved

1. Sections 410(a) and 421 of the Federal Tort Claims Act, Act of August 2, 1946, c. 753, Title IV, 60 Stat., 842, now, with immaterial amendments, in the new Judicial Code, provide:

Sec. 410(a). Subject to the provisions of this title, the United States district court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, including the United States district courts for the Territories and possessions of the United States, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this title, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages. Costs shall be allowed in all courts to the successful claimant to the same extent as if the United States were a private litigant, except that such costs shall not include attorneys' fees.

Sec. 421. The provisions of this title shall not apply to——

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or

not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by the Act of March 9, 1920 (U. S. C., title 46, secs. 741-752, inclusive), or the Act of March 3, 1925 (U. S. C., title 46, secs. 781-790, inclusive), relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of the Trading with the Enemy Act, as amended.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Any claim arising from injury to vessels, or to the cargo, crew, or passengers of vessels, while passing through the locks of the Panama Canal or while in Canal Zone waters.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

2. The new Judicial Code, 28 U. S. C. provides:

28 U. S. 1346. *United States as defendant.*

(b) Subject to the provisions of chapter 173 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

28 U. S. C. 2674. *Liability of United States.*

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

28 U. S. C. 2678. *Attorneys' fees; penalty.*

The court rendering a judgment for the plaintiff pursuant to section 1346(b) of this title, or the head of

the federal agency or his designee making an award pursuant to section 2672 of this title, or the Attorney General making a disposition pursuant to section 2677 of this title, may, as a part of such judgment, award, or settlement, determine and allow reasonable attorney fees, which, if the recovery is $500 or more, shall not exceed 10 per centum of the amount recovered under section 2672 of this title, or 20 per centum of the amount recovered under section 1346(b) of this title, to be paid out of but not in addition to the amount of judgment, award, or settlement recovered, to the attorneys representing the claimant.

Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had, shall be fined not more than $2,000 or imprisoned not more than one year, or both.

3. 28 U. S. C. 1402. *United States as defendant.*

(b) Any civil action on a tort claim against the United States under subsection (b) of section 1346 of this title may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred.

28 U. S. C. 1404. *Change of venue.*

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

4. The pertinent part of R. S. 3477, 31 U. S. C. 203, provides:

31 U. S. C. 203.

All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the pres-

ence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment or warrant of attorney to the person acknowledging the same. The provisions of this section shall not apply to payments for rent of post-office quarters made by post-masters to duly authorized agents of the lessors.

5. The pertinent parts of Section 29 of the New York Workmen's Compensation Law, as amended by L. 1947, c. 9 and 144, provide:

Section 29. *Remedies of employees; subrogation.*

1. If an employee entitled to compensation under this chapter be injured or killed by the negligence or wrong of another not in the same employ, such injured employee, or in case of death, his dependents, need not elect whether to take compensation and medical benefits under this chapter or to pursue his remedy against such other but may take such compensation and medical benefits and at any time either prior thereto or within six months after the awarding of compensation or within nine months after the enactment of a law or laws creating, establishing or affording a new or additional remedy or remedies, pursue his remedy against such other subject to the provisions of this chapter. If such injured employee, or in case of death, his dependents, take or intend to take compensation, and medical benefits in the case of an employee, under this chapter and desire to bring action against such other, such action must be commenced not later than six months after the awarding of compensation or not later than nine months after the enactment of such law or laws creating, establishing or affording a new or additional remedy or remedies and in any event before

the expiration of one year from the date such action accrues. In such case, the state insurance fund, if compensation be payable therefrom, and otherwise the person, association, corporation or insurance carrier liable for the payment of such compensation, as the case may be, shall have a lien on the proceeds of any recovery from such other, whether by judgment, settlement or otherwise, after the deduction of the reasonable and necessary expenditures, including attorney's fees, incurred in effecting such recovery, to the extent of the total amount of compensation awarded under or provided or estimated by this chapter for such case and the expenses for medical treatment paid or to be paid by it and to such extent such recovery shall be deemed for the benefit of such fund, person, association, corporation or carrier. Notice of the commencement of such action shall be given within thirty days thereafter to the chairman, the employer and the insurance carrier upon a form prescribed by the chairman.

2. If such injured employee, or in case of death, his dependents, has taken compensation under this chapter but has failed to commence action against such other within the time limited therefor by subdivision one, such failure shall operate as an assignment of the cause of action against such other to the state for the benefit of the state insurance fund, if compensation be payable therefrom, and otherwise to the person, association, corporation, or insurance carrier liable for the payment of such compensation. If such fund, person, association, corporation or carrier, as such an assignee, recover from such other, either by judgment, settlement or otherwise, a sum in excess of the total amount of compensation awarded to such injured employee or his dependents and the expenses for medical treatment paid by it, together with the reasonable and necessary expenditures incurred in effecting such recovery, it shall forthwith pay to such injured employee or his dependents, as the case may be, two-thirds of such excess, and to the extent of two-thirds of any such excess such recovery shall be deemed for the benefit of such employee or his dependents.

6. Federal Rules of Civil Procedure Rule 17.

(a) *Real Party in Interest.* Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States.